(3)

Supreme Court, U.S.
FILED
FEB 0 6 2007
OFFICE OF THE CLERK

No. 06-812

IN THE SUPREME COURT OF THE UNITED STATES

ERIC SIMMONS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Florida

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

JANICE C. ORR
Counsel of Record
1980 Prevatt Street, Suite 3
Eustis, Florida 32726
(352)589-9031

QUESTIONS PRESENTED
CAPITAL CASE

1. Whether this Court has jurisdiction to consider the case at bar.

2. Whether the lower courts misconstrued this Court's holdings such that the Petitioner's Fourth Amendment rights were violated in admitting certain evidence and whether those holdings have and will result in violations of the Equal Protection Clause of the Fourteenth Amendment.

3. Whether the admission of a questionable confession violates the Equal Protection Clause of the Fourteenth Amendment and whether this Court's guidance in such cases is required.

4. Whether the standard of review for this circumstantial evidence case was appropriate and, if not, if the Petitioner's due process rights were violated; and whether review of such cases requires this Court's actions to ensure equal protection under the law.

5. Whether the lower courts failed to apply the appropriate standards set by this Court in admitting out-of-court identifications in violation of the Petitioner's Fourteenth Amendment rights.

6. Whether the issue of permitting expert testimony requires this Court's intervention to resolve disputes between the several States and between the Federal circuit courts.

7. Whether the circumstances of this case were such that it constituted a violation of the Petitioner's due process rights in disallowing an expert on eyewitness testimony.

8. Whether the lower courts inappropriately applied this Court's well-established holdings in determining that a search warrant was appropriately issued and, therefore, whether the Petitioner's Fourth Amendment rights were violated by admitting evidence which was ill gotten.

9. Whether the trial court lacked venue to hear the case and whether the lower courts applied the wrong standard in making their determinations.

10. Whether, with all of the errors and the violations of the Petitioner's constitutional rights, the trial was a fair trial as required under the Fourteenth Amendment. The totality of the circumstances upon which the Florida Supreme Court heavily relied overwhelmingly demonstrates that the trial was not fair and justice requires that the lower court decision be overturned.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
STATEMENT	1
RESPONSE TO REASONS IN OPPOSITION	2
REASON I	2
THIS COURT HAS JURISDICTION TO CONSIDER THE CASE AT BAR	
REASON II	3
THE FLORIDA SUPREME COURT'S DECISION CONCERNING THE VOLUNTARINESS OF PETITIONER'S STATEMENTS IS CONTRARY TO THIS COURT'S DECISIONS AND THE CONSTITUTION OF THE UNITED STATES	
REASON III	4
PETITIONER HAS NOT REQUESTED AN ADVISORY OPINION AND THE OPPOSITION IS WITHOUT MERIT	

Page

REASON IV 4

RESPONDENT'S OPPOSITION MISSTATES PETITIONER'S ARGUMENT WHICH CONCERNS THE STANDARD OF REVIEW APPLIED BY THE FLORIDA SUPREME COURT IN THE INSTANT CASE

REASON V 5

THE FLORIDA SUPREME COURT MISAPPLIED THIS COURT'S HOLDING IN *NEIL V. BIGGERS*

REASONS VI AND VII 6

PETITIONER IS NOT REQUESTING THE ESTABLISHMENT OF A BRIGHT-LINE RULE ON EXPERT WITNESS TESTIMONY ON EYEWITNESSES AND REVIEW OF THIS ISSUE SHOULD BE GRANTED

REASON VIII 7

THE FLORIDA SUPREME COURT'S DECISION ON THE SUPPRESSION OF EVIDENCE FROM THE VEHICLE WAS WRONGFULLY DECIDED AND RESULTED IN A VIOLATION OF THE PETITIONER'S FOURTH AMENDMENT RIGHTS

Page

REASON IX 8

THE PETITIONER'S SIXTH AMENDMENT RIGHTS WERE VIOLATED BY THE FLORIDA SUPREME COURT'S RULING ON THE ISSUE OF VENUE

REASON X 8

REVIEW BY THIS COURT IS WARRANTED ON THE BASIS OF DUE PROCESS VIOLATIONS WHICH OCCURRED THROUGHOUT THE JUDICIAL PROCEEDINGS IN THIS CASE TO DATE

CONCLUSION 9

TABLE OF AUTHORITIES

Page(s)

CASES

Franks v. Delaware, 438 U.S. 154 (1978) 7

Hayes v. Florida, 470 U.S. 811 (1985) 3

Kaupp v. Texas, 538 U.S. 626 (2003) 3

Neil v. Biggers, 409 U.S. 188 (1972) 5

United States v. Mendenhall, 446 U.S. 544 (1980) 3

No. 06-812

IN THE SUPREME COURT OF THE UNITED STATES

ERIC SIMMONS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Florida

---

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Petitioner, Eric Simmons, respectfully replies to the Brief in Opposition filed by Respondent to the Petition for a Writ of Certiorari to the Supreme Court of the State of Florida in this case.

STATEMENT

Respondent has quoted the decision of the Florida Supreme Court as its Statement of the Case and Facts. Petitioner has addressed the errors in the lower court's "facts" in its Petition and will not reargue those matters here. Petitioner would note,

impossible to address nebulous allegations. Petitioner based its facts on the record of the case.

RESPONSES TO REASONS IN OPPOSITION

REASON I

THIS COURT HAS JURISDICTION TO CONSIDER THE CASE AT BAR

Respondent argues that this Court lack jurisdiction to hear the Petition filed in this case. Its argument is based upon the fact that there was a pending motion filed by Petitioner at the Florida Supreme Court at the time of the filing of the Petition.

Petitioner contacted the Clerk of this Court to determine whether the filing of the Petition should be delayed during the pendency of that motion. Petitioner was granted one extension to permit the Florida Supreme Court more time to act, but was told to file the Petition as ordered by this Court when the lower court failed to act in a timely manner.

Certainly the Clerk of this Court is well aware of the Court's jurisdictional requirements and instructed Petitioner properly. Petitioner was told that a supplemental Petition could be filed if the eventual action by the lower court warranted. However, the Florida Supreme Court issued a summary denial of the Petitioner's Motion on January 10, 2007, which was submitted to this Court by Respondent. The Florida Supreme Court's action is, therefore, has no impact on this Court's decision on the Petition as filed. This reason in opposition is without merit.

REASON II

THE FLORIDA SUPREME COURT'S DECISION CONCERNING THE VOLUNTARINESS OF PETITIONER'S STATEMENTS IS CONTRARY TO THIS COURT'S DECISIONS AND THE CONSTITUTION OF THE UNITED STATES

Respondent alleges that Petitioner has failed to demonstrate that the decision of the Florida Supreme Court is contrary to decisions of this Court and violative of Petitioner's Fourth Amendment rights under the Constitution. This is argued fully in the Petition.

The lower court's decision is a gross misinterpretation of both *Hayes v. Florida*, 470 U.S. 811 (1985), and *Kaupp v. Texas*, 538 U.S. 626 (2003), as well as the cases citing those decisions. Respondents efforts to give credence to the Florida court's reading of those cases falls far short. It claims that because the two detectives who directly spoke to the Petitioner were allegedly unarmed one can ignore the other over one dozen armed officers, numerous squad cars filling the driveway of the Petitioner's parents' home, and the police helicopter hovering overhead. Respondent claims that the handcuffing of the Petitioner was "brief", occurring only during the "voluntary" transportation of Petitioner in the back of a locked, marked unit. It is preposterous to reach the conclusion that the Petitioner could possibly have believed he was free to simply walk away.

Respondent attempts to bolster its argument by citing *United States v. Mendenhall*, 446 U.S. 544 (1980). If anything, that case supports Petitioner's argument. However, that case involved an investigative stop. The defendant in that case was

deemed to be suspicious behavior. That situation is very different from the majority of the sheriff's office arriving at the home of the Petitioner's parents as is the case here.

The only other issue addressed in this argument by Respondent is that of probable cause. Respondent adds nothing to the decision of the Florida Supreme Court and the Petitioner's argument on that matter was made in the Petition.

The opposition on this issue is without merit and the writ should be issued.

REASON III

PETITIONER HAS NOT REQUESTED AN ADVISORY OPINION AND THE OPPOSITION IS WITHOUT MERIT

Respondent states that Petitioner is seeking an advisory opinion from this Court. No where in the Petition was any such request made. The argument made by Petitioner concerning the lower court's reliance on the so-called confession in this case is set forth in the Petition and remains unrefuted by Respondent.

REASON IV

RESPONDENT'S OPPOSITION MISSTATES PETITIONER'S ARGUMENT WHICH CONCERNS THE STANDARD OF REVIEW APPLIED BY THE FLORIDA SUPREME COURT IN THE INSTANT CASE

Respondent claims that Petitioner is requesting this Court to make a factual determination on this case. While the facts must certainly be reviewed, the argument of Petitioner in its third basis

the standard of review applied by the Florida Supreme Court in its decision and due process considerations concerning the circumstantial nature of this case.

Instead of arguing the matters of substance, Respondent reiterates its unsubstantiated claim that Petitioner is misstating facts and simply reiterating the decision of the Florida Supreme Court. Respondent fails to address the import issue upon which review is requested by this Court, namely the propriety of the standard of review in circumstantial evidence cases, particularly in cases in which the State is attempting to take a man's life. To say that this is of no public import and does not involve constitutional issues defies logic. Respondent's opposition is without merit and review on this issue is warranted.

REASON V

THE FLORIDA SUPREME COURT MISAPPLIED THIS COURT'S HOLDING IN *NEIL V. BIGGERS*

Respondent's argument on this issue is curious but is consistent with its argument elsewhere in its opposition. Respondent claims that merely citing to the applicable law makes whatever decision is reached all right and precludes this Court's review of the matter. It seems to be of no moment to Respondent that the substance of the controlling law is followed.

As argued in the Petition, the Florida Supreme Court misapplied the criteria set forth by this Court in *Neil v. Biggers*, 409 U.S. 188 (1972), in determining the matter of admissibility of out-of-court identifications. By improperly applying the law, the decision necessarily conflicts with the decision of this Court and the cases citing it.

Respondent does not refute any of the substantive argument on this issue. The opposition on this matter is without merit and the issuance of the writ is warranted.

REASONS VI AND VII

PETITIONER IS NOT REQUESTING THE ESTABLISHMENT OF A BRIGHT-LINE RULE ON EXPERT WITNESS TESTIMONY ON EYEWITNESSES AND REVIEW OF THIS ISSUE SHOULD BE GRANTED

Respondent lumps two issues raised by Petitioner concerning eyewitness testimony and the use of experts on this issue. Petitioner stands by the arguments made in the Petition and addresses only the brief opposition to this matter raised by Respondent.

Respondent argues that the trial judge had wide discretion under applicable Florida law and there is, therefore, no basis for this Court's review on this issue. As more fully outlined in the Petition, this issue caused several justices to write concurring opinions in the decision of the Florida Supreme Court in this case expressing their concerns over the many problems which have arisen concerning eyewitness testimony. As demonstrated in the Petition, courts across the country have been grappling with this problem. The result has been conflicting resolutions to this problem, which requires the review of this Court.

Respondent's opposition simply ignores the arguments raised by Petitioner. Its opposition is without merit. Review by this Court is warranted and highly necessary. This is a matter of great public importance.

REASON VIII

THE FLORIDA SUPREME COURT'S DECISION ON THE SUPPRESSION OF EVIDENCE FROM THE VEHICLE WAS WRONGFULLY DECIDED AND RESULTED IN A VIOLATION OF THE PETITIONER'S FOURTH AMENDMENT RIGHTS

Respondent's argument is virtually the same as that in its opposition in Reason V, *supra*. Here, it claims that because the Florida Supreme Court "recognized" this Court's holding in *Franks v. Delaware*, 438 U.S. 154 (1978), anything from that point on is all right. Application of the law appears inconsequential to Respondent. Beyond reiterating the statements made by the Florida Supreme Court, Respondent continues its allegations that Petitioner is fabricating facts. Again, there is nothing to refute as this is no more than a bare allegation.

One point raised by Respondent in footnote 7 is worthy of note. It claims that the detective's observation of blood in the Petitioner's vehicle (an allegedly bloody sheet) was not refuted. That sheet was presented to the trial judge during the suppression hearing. No blood could be found on that sheet nor did the State at the trial level ever again claim that there was any blood on the sheet. The Respondent and the Florida Supreme Court's statement of "facts" is inaccurate in many other respects as well, as pointed out in the Petition.

Review by this Court on this issue is warranted. The Opposition is without merit and the arguments in the Petition that the Florida Supreme Court's ruling was contrary to this Court's law the violative of the Petitioner's Fourth Amendment rights stand.

REASON IX

THE PETITIONER'S SIXTH AMENDMENT RIGHTS WERE VIOLATED BY THE FLORIDA SUPREME COURT'S RULING ON THE ISSUE OF VENUE

Respondent claims that there is no Federal constitutional claim raised by Petitioner in the issue concerning venue. Respondent has chosen to ignore the Sixth Amendment to the United States Constitution. It is the Petitioner's rights under this constitutional provision upon which review is sought. The Opposition on this issue is without merit.

REASON X

REVIEW BY THIS COURT IS WARRANTED ON THE BASIS OF DUE PROCESS VIOLATIONS WHICH OCCURRED THROUGHOUT THE JUDICIAL PROCEEDINGS IN THIS CASE TO DATE

Respondent's argument in Reason X is the same as that throughout its Opposition, *i.e.*, the Petitioner misstates facts and the Florida Supreme Court's decision is correct.

Petitioner has presented numerous bases to this Court which warrant its review. Petitioner has consistently maintained his innocence of the crimes alleged. While it is understood that actual innocence alone is not the basis for review by this Court, it is certainly something which cannot be ignored. The number of wrongful convictions is legend and is a black mark on the whole judicial process. The reasons for those wrongful convictions are almost all present in the instant case. This should not be

overlooked by this Court in reaching a decision on whether a review of the case is warranted.

As the Petition demonstrates, Petitioner's constitutional rights were violated in many ways, the trial court initially made erroneous determinations of law and the Florida Supreme Court did little more than rubber stamp the trial court's errors.

This is a capital case which warrants the closest scrutiny. The very life of the Petitioner rests in the balance. It is respectfully requested that this honorable Court review this case to make a determination for itself as to whether the constitutional rights of the Petitioner were upheld and whether the courts below properly applied this Court's rulings. It is sincerely believed that, should this Court grant the writ sought, it will determine that the Petitioner's arguments are meritorious.

CONCLUSION

Respondent's Opposition contains little if any substance. The Petitioner has provided this Court with numerous reasons for its review. It is respectfully requested that this Court issue the writ for certiorari to the Florida Supreme Court to review the matters addressed in the Petition.

Respectfully submitted,

JANICE C. ORR
Florida Bar No. 0160581
1980 Prevatt Street, Suite 3
Eustis, Florida 32726
(352)589-9031

COUNSEL FOR PETITIONER